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No. 85-516

In the Supreme Court of the United States

OCTOBER TERM, 1985

VERNICE DUBOSE, ET AL., PETITIONERS

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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Petitioners challenge the court of appeals' denial of their application for attorneys' fees and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

1. This attorneys' fee dispute arises out of litigation challenging the Secretary of Housing and Urban Development's decision not to implement an "operating subsidy" program, intended to offset rent increases for low-income tenants attributable to higher property taxes and utility costs incurred by project owners. The program was authorized by the Housing and Community Development Act of 1974, 12 U.S.C. (Supp. IV 1980) 1715z-1(f)(3)(A), repealed by the Omnibus Budget and Reconciliation Act of 1981, Pub. L. No. 97-35, § 322(f), 95 Stat. 403. Congress did not provide sufficient contract authority for the Secretary to implement all of the subsidy programs authorized by the

Housing and Community Development Act. Accordingly, Secretary Hills concluded that she had discretion to decline to implement the operating subsidy program at issue here, which she determined to be the least efficient of the various programs authorized by Congress. See Pet. App. 9. In deciding not to implement the operating subsidy program, the Secretary relied on a then-recent decision of the District of Columbia Circuit, *Pennsylvania* v. *Lynn*, 501 F.2d 848 (1974), which held that the Secretary had discretion to refuse to implement a program that would interfere with the nation's housing goals (see Pet. App. 12).

The Secretary's decision not to implement the operating subsidy program spawned a rash of litigation. Several district courts, including the district court in the instant case, and two courts of appeals rejected the Secretary's defense of her decision. See *Dubose* v. *Harris*, 82 F.R.D. 582, 585 (D. Conn. 1979); *Ross* v. *Community Services, Inc.*, 396 F. Supp. 278, subsequent opinion, 405 F. Supp. 831 (D. Md. 1975), aff'd mem., 544 F.2d 514 (4th Cir. 1976) (Table), cert. granted *sub nom. Harris* v. *Ross*, 431 U.S. 928 (1977), remanded for consideration of settlement, 439 U.S. 1001 (1978); *Abrams* v. *Hills*, 415 F. Supp. 550 (C.D. Cal.), aff'd, 547 F.2d 1062 (9th Cir. 1976), cert. granted *sub nom. Harris* v. *Abrams*, 431 U.S. 928 (1977), remanded for consideration of settlement, 439 U.S. 1001 (1978). Upon application of the Secretary, however, this Court stayed the district court's 1976 order in *Underwood* v. *Hills*, 414 F. Supp. 526 (D.D.C.), a nationwide class action, which would have required the Secretary to implement the operating subsidy program. *Hills* v. *Underwood*, 429 U.S. 892 (1976).[1]

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[1]The *Underwood* litigation was subsequently transferred from the United States District Court for the District of Columbia to the United States District Court for the Central District of California. *Underwood* v. *Hills*, No. 76-469 (D.D.C. Apr. 5, 1979).

Following this Court's grant of a stay in *Underwood*, the Second Circuit stayed the order of the district court in the instant case, thus relieving the Secretary of the obligation to implement the operating subsidy program in Connecticut. This Court refused to vacate the Second Circuit's stay. *Dubose* v. *Harris*, 429 U.S. 1085 (1977). In addition, the Court granted the government's petitions for a writ of certiorari in two other operating subsidy cases. *Harris* v. *Abrams*, 431 U.S. 928 (1977); *Harris* v. *Ross*, 431 U.S. 928 (1977).

Before this Court could resolve the merits of the operating subsidy dispute, the parties involved in the various cases reached a comprehensive settlement. Pet. App. 117-143. Under the terms of the settlement, HUD made available a settlement fund of approximately $60 million to reimburse tenants and project owners for their increased costs. *Id.* at 119. The agreement provided that the settlement fund was to be administered by a committee of plaintiffs' counsel, with the cost of settlement administration to be paid partially out of the settlement fund and partially by HUD. *Id.* at 123-124. The settlement agreement further provided that "[i]t is the intent of the parties that distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD" (*id.* at 124); that "[n]one of the sums distributed may be used to pay attorney's fees" (*id.* at 121); and that "any money which remains after [payment of all claims and settlement costs assigned to HUD] * * * shall be returned to HUD and shall be credited to the reserve fund established by Section 236(g) of the National Housing Act, as amended" (*ibid.*).

2. The operating subsidy cases remained at least technically alive pending the conclusion of settlement administration. Pet. App. 129-130. In October 1981, more that two years after the settlement agreement had been signed, the

Equal Access to Justice Act, 28 U.S.C. 2412, took effect. Thereafter, plaintiffs' counsel in several of the operating subsidy cases, including the instant case, moved for attorneys' fees and expenses under subsection (d) of the EAJA.[2] The government opposed the fee applications, principally on the grounds that the Secretary's position in the litigation was "substantially justified," the settlement agreement was intended to preclude any fee awards, and special circumstances unique to the operating subsidy litigation would make attorneys' fee awards unjust.[3]

In the instant case, petitioners' counsel sought a fee award of approximately $1.5 million for their services in the litigation and the administration of the settlement fund. The district court held that they were entitled to an award of fees, rejecting the government's argument that this Court's actions in staying the *Underwood* nationwide injunction and granting the Secretary's petitions for a writ of certiorari in two other operating subsidy cases demonstrated that HUD's position was "substantially justified." Pet. App. 36-41. The district court also rejected the government's alternative argument that the settlement agreement either barred attorneys' fee awards to petitioners' counsel or constituted a "special circumstance" that would make fee awards unjust. *Id.* at 41-42. The district court awarded petitioners' counsel a total of $141,705 in attorneys' fees and expenses. *Id.* at 64-66.

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[2]Section 2412(d) directs a court to award attorneys' fees to a prevailing party in any civil action (other than a tort action) brought by or against the United States unless the court finds that the position of the United States was substantially justified or that special circumstances would make an award unjust.

[3]The government also contended that the operating subsidy cases were not "pending" on the effective date of the EAJA and that the EAJA did not authorize fee awards for work performed prior to its effective date. The district court rejected these arguments (Pet. App. 33-35), and the government did not renew them on appeal.

The government appealed from the district court's ruling that petitioners were entitled to fees, while petitioners took a cross-appeal with respect to the amount of fees. The court of appeals reversed the district court's determination that petitioners were entitled to fees, holding that the government's position had been "substantially justified." Pet. App. 2-18. The court of appeals held that the Secretary had reasonably relied on *Pennsylvania* v. *Lynn, supra*, which the court noted was the "only judicial guidance available" at the time the underlying operating subsidy litigation was commenced. Pet. App. 13. The court also found reasonable the government's consistent determination to seek appellate resolution of the operating subsidy controversy. *Id.* at 14, 15-16. In addition, the court noted that the various stays and grants of review by this Court were "indicative of the courts' view that the government's position was not unreasonable." *Id.* at 16. Finally, the court declined to hold that the government's position lacked substantial justification simply because HUD ultimately decided to settle the dispute, noting that any such holding would have a chilling effect on an agency's willingness to settle future cases. *Id.* at 17.[4]

Less than 10 days after the court of appeals' decision in this case, the Ninth Circuit held that the government's position in the operating subsidy litigation had *not* been "substantially justified," and it affirmed in substantial part a district court award of attorneys' fees under the EAJA. *Underwood* v. *Pierce*, 761 F.2d 1342 (1985), petition for reh'g pending. The Ninth Circuit's decision does not refer to the court of appeals' decision in this case, and, from the timing of the two decisions, we infer that the Ninth Circuit

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[4]In light of the court of appeals' favorable disposition of the government's appeal, the court did not reach the issues presented by petitioners' cross-appeal. Pet. App. 17-18.

was not aware of the Second Circuit's opinion. On July 8, 1985, the government filed a petition for rehearing in *Underwood*, with a suggestion that the case be reheard en banc. To date, the Ninth Circuit has not acted on the petition.

3. Petitioners allege (Pet. 7) that the decision below conflicts with the Ninth Circuit's decision in *Underwood*. We agree that the two decisions are in conflict, and we stressed that fact, among others, in our rehearing petition in *Underwood*. In our view, however, the conflict is not ripe for resolution by this Court. Because of the pendency of the government's rehearing petition in *Underwood*, it remains entirely possible that the conflict in the circuits upon which petitioners rely may disappear. We therefore suggest that the Court should hold the instant petition pending action by the Ninth Circuit on the government's rehearing petition in *Underwood*. When the rehearing petition has been acted upon, we will file a supplemental memorandum in this case, advising the Court of the final disposition of the *Underwood* litigation and of our views on the correct disposition of the instant petition for a writ of certiorari.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held pending the Ninth Circuit's disposition of the government's petition for rehearing in *Underwood* v. *Pierce* and the filing by the government of a supplemental memorandum in this Court.

CHARLES FRIED
Solicitor General

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